

No. 17382 ✓

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

--

IRVING GOLDHEIMER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Apellee.

--

APPELLANT'S OPENING BRIEF

--

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STATEMENT OF PLEADINGS AND
FACTS DISCLOSING JURISDICTION

Defendant Irving Goldheimer, together with Defendants Eugene Duvalcourt Walker, Bryce Wilson, Nicolas Rodriquez Medina, and Francisco Ochoa Mendez, were charged in an Indictment with a violation of 21 U.S.C. (1) 174, 176(a), conspiracy to import heroin and marihuana.

Goldheimer was charged in Count One with conspiracy

(1) The record consists of the Clerk's Transcript, the Reporter's Transcript in three volumes, and the exhibits, table of which, pursuant to Rule 18(f) of this Court is set out hereinafter as Appendix "A", together with motion for new trial and the minutes of the Court, including motions for judgment of acquittal as to Goldheimer, and other matters.

to violate 21 U.S.C. 174. Reference to the Indictment is hereby made, which Indictment, in substance, charged they conspired to receive, conceal, transport and facilitate the concealment and transportation, and sell and facilitate the sale of heroin, a narcotic drug.

Count Two of the Indictment charged Walker, Goldheimer, Wilson, Medina and Mendez with knowingly conspiring to receive, conceal, transport and facilitate the sale of marihuana, which, as the defendants would then and there well know, would have been imported into the United States of America contrary to law, and to wilfully smuggle and clandestinely introduce into the United States from Mexico, marihuana, with intent to defraud the United States, in violation of U. S. C. Title 21, Section 176.

To the Indictment the defendants Walker and Goldheimer entered pleas of not guilty and proceeded to trial before the Court, sitting with a jury. The other defendants named in the Indictment, so far as is known to this appellant, were never apprehended or brought to trial. The Trial Court had jurisdiction under 18 U.S.C. 3231.

The jury found Defendant Goldheimer guilty of both counts; the judgment was twenty (20) years on Counts One and Two, both to run concurrently, a total of twenty (20) years.

This Court has jurisdiction of the appeal under 28 U.S.C. 1291.

Judgment for Goldheimer was filed November 28, 1960, as appears from the certified transcript of the record by the Clerk. Notice of Appeal for Goldheimer was timely filed December 1, 1960, as appears from the certified transcript of the record by the District Clerk, and a Request For and Designation of the Record and Proceedings to be contained in the record on appeal, and statement of points upon which the Appellant Goldheimer intends to rely upon appeal, was filed December 1, 1960, as appears from the Transcript of the Record filed by the Clerk.

STATEMENT OF THE CASE

FACTS PERTINENT TO THE APPEAL

Count One charges the crime of conspiracy. Count One stated, in brief, that the Appellants Walker and Goldheimer, together with the other defendants named therein, conspired to knowingly and unlawfully receive, conceal, transport and facilitate the concealment and transportation, and sell and facilitate the sale of heroin, a narcotic drug, which, as the defendants would then and there well know, would have been imported into the United States of America contrary to U.S.C., Title 21, Section 174, and clandestinely introduce into the United States from Mexico, heroin, with intent to defraud the United States, which merchandise should have been invoiced prior to importation into the United States, in violation of U.S.C., Title 21, Section 174.

Count Two charged Walker, Goldheimer, and the other defendants, with having conspired to knowingly and unlawfully receive, conceal, transport and facilitate the concealment and transportation, and sell and facilitate the sale of marihuana, in violation of U.S.C. Title 21, Section 176.

Various overt acts are alleged in both Counts One and Two.

EVIDENCE ON THE MERITS AT THE TRIAL

Summarized, the pertinent evidence to the appeal is as follows:

PROSECUTION

JAMES RALPH WEBSTER testified that while he was in jail in Long Beach he met the defendant-appellant Goldheimer (RT 4,5); Webster stated that while he was in the jail from time to time he had "small bits of conversation here and there" with Goldheimer (RT 8,9). During the course of their conversations, Webster stated Goldheimer told him he had been to Mexico and that he had some narcotics sources in Mexico (RT 12,13); that he intended to go down to Mexico again; that he had a friend who had a boat, and they were intending to import a large quantity of marihuana (RT 13,14). Webster stated he was in jail for carrying a concealed weapon and possession of a dangerous drug (RT 15); some time in May or June he met Donald Wilets (RT 15); he met Agent Wilets in a drive-in at Manchester and Figueroa (RT 17), where he had a conversation with

Wilets and outlined to him the general conversations he had had with Goldheimer (RT 17). He went to Baja California with Wilets and told him he had met a man who said he had a source of supply of narcotics in Mexico (RT 18, 19). About June 23, 1960, he met Goldheimer and Walker at a restaurant in North Long Beach (RT 19); they talked about the boat and later they went to Newport Beach where the boat was berthed and they looked at the boat (RT 24,25). They looked at the chart room and some charts of the Mexican area below Ensenada. Walker said it was his intention to have the shipment wrapped in water-proofed packages, compressed, and put into sail bags; they are put on deck when a ship is at sea (RT 25,26). Goldheimer said he was short of money; he had some money in Mexico; and the witness was to get some money together. In the interim he reported to Agent Wilets (RT 28).

The witness stated he told Goldheimer he wanted them to meet his financial backer (RT 29,30); he planned to meet Goldheimer July 13, 1960, and he met Goldheimer at the Scandia Restaurant, at which time he had Mr. Wilets with him; he and Wilets had a drink and waited for the arrival of Goldheimer

(RT 30,31); Goldheimer appeared, but Walker was not available; he told Goldheimer Wilets was a big man in the narcotics business and could be a financial backer (RT 31,32). On July 14, 1960, together with Agent Wilets, he met Goldheimer and Walker at the Palms Bar (RT 33); he could not remember what Goldheimer said, but what Walker said; Walker looked at Wilets and asked Webster if Wilets was all right; he replied he was (RT 34); Walker asked if Wilets was going to put up any "front money" (RT 34,35). He met Goldheimer July 28, 1960; asked Goldheimer if he was ready to go to Mexico; Goldheimer said he would be ready the following morning, but that he was short of cash; he couldn't get it (RT 36).

The witness testified Goldheimer asked him if he would make all the arrangements, get the tickets, etc. (RT 36). He met Wilets the next day at the CMA Airlines Office and arranged for two tourists cards for himself and Goldheimer to Guadalajara and two tickets from Los Angeles to Guadalajara (RT 36,37). On July 29, 1960, he met Mr. Wilets, who picked him up in downtown Los Angeles; they then picked up Goldheimer and went to the airport (RT 37); on the way to the airport they

said they would try their darndest to bring the matter to a head, get a clean commitment; they went to the airport; he and Goldheimer boarded the plane and they flew to Guadalajara by way of Mazatlan (RT 37, 38).

The witness stated that Mr. Goldheimer and Wilson returned from Puerto Vallarta and the following day they all went to the Guadalajara State Prison (RT 43, 44); there they saw Bonifacio Talaveras; at the prison they talked about marihuana and how much was available (RT 45,46). While in the prison, the witness said they were dealing marihuana out of a prison cell; they also talked about the manufacture of heroin (RT 47,48). While in the prison, Talaveras sent a man out, who returned later and stated there was some heroin available in about a week; there was a discussion about the price (RT 49,50). In a day or so they returned to the prison, that is, Wilson, Goldheimer and the witness, and the witness said that he stated \$10,000.00 was an acceptable price for a kilogram of hereoin, and he wanted to know when delivery could be made (RT 52,53). The witness stated he, in fact, purchased the ticket, which cost \$137.00, from Los Angeles to Guadalajara, but that Goldheimer had given him \$100.00 of the money, stating he was short (RT 60,61).

On August 4, 1960, he and Goldheimer returned to Los Angeles, where they were met at the airport by Agent Wilets (RT 62,63). On the way in to town, Goldheimer said they had made arrangements to return to Guadalajara on the 21st of August, where they could pick up heroin and marihuana, and that the price was \$10,000.00 American money (RT 63,64). Mr. Goldheimer said he could not go to Mexico on the 21st because he had some appearance in Court to look after, and it was understood that the witness and Wilets would return to Mexico (RT 65,66). The witness stated he went to Tijuana about August 18th with Agent Wilets, and from there he went to Guadalajara by himself. The witness went to Guadalajara, but failed to find Mr. Wilson, so he went to Puerto Vallarta, where he found Mr. and Mrs. Wilson (RT 67,68). He stated that Wilson told him he was unable to stay in Guadalajara, that he did not have the funds, and he was waiting for the heroin to be available, but Wilson returned with the witness to Guadalajara where they met Agent Chappell (RT 68,69). The witness, Wilson and Chappell then went to the penitentiary; they arranged to meet Mr. Medina, at which time there was present the witness, Wilson, and Chappell; they met in a bar in Guadalajara; the

witness, Wilson, Medina and Chappell discussed getting the heroin and discussed talking to a grower who grew the opium by the name of Ochoa Mendez. Some two days later they met Mendez in a hotel (RT 71,72). Arrangements were made to meet in another town; Mendez and Medina said they were not too sure that these men were not Federal Agents and they did not want to be hijacked (RT 74,75). They arranged to meet in a hotel and Mendez left the room and returned with a raffia-type shopping bag containing some article; Chappell looked at it and said it was opium; Chappell then had a small hand bag with his toilet articles from which he took a 38-caliber revolver and placed Medina and Mendez under arrest (RT 80,81).

On cross examination, Webster stated he had been in jail with Goldheimer; that while in jail Goldheimer gave him a telephone number at which he could be reached if Webster cared to call him; that was at the Normandie Village Apartments, in Los Angeles (RT 84). After he was released, he called Goldheimer and made an appointment with him; he suggested where they meet; when he met Goldheimer, he talked with him; after their first meeting, he again met Goldheimer a week or so later in the month of June, 1960. He met

Goldheimer in Court, in the Jergins Trust Building (RT 88,89). The witness stated he had been in Mexico several times, probably a dozen; he had studied Spanish there; he could speak Spanish fluently (RT 91, 92); he arranged the meeting between Wilets and Goldheimer at the Scandia Restaurant (RT 91-93); he actually went to the airport with Goldheimer after meeting Wilets, and he actually bought the tickets (RT 93, 94); he gave the CMA Clerk the names James R. Webster and Irving Goldheimer. He had about \$350 at that time which had been given to him by Agent Wilets (RT 94,95); Wilets had given him the \$300 prior to his meeting Goldheimer on that day. When they arrived at Guadalajara, he and Goldheimer had a double room (RT 97). While he was in Mexico and they met these various people concerning whom he had previously testified, he stated that Goldheimer neither spoke nor understood Spanish (RT 98,99). That after returning to Los Angeles, he did not meet Goldheimer for about two weeks (RT 100); he and Goldheimer met at the Pancake Restaurant, and from that time to his appearance in Court, he had not met him again. The witness admitted he had met Agent Wilets through Deputy Sheriff Berman, and that from the time of their

meeting he had had some six or seven hundred dollars from Wilets (RT 101, 102); the money was given to him in the Federal Building. He stated that prior to going to Mexico with Mr. Goldheimer, he had discussed with Mr. Wilets what they were to do in Mexico in connection with Mr. Goldheimer (RT 105,106). The witness stated he had been convicted of a felony, to wit, bank robbery, in three separate counts, and he was sentenced to ten years, to run concurrently, in Cases No. 29059 and No. 29005, United States District Court, Southern District of California, Central Division (RT 108). That at times he had been under psychiatric care; that at the time he pled guilty to bank robbery there was some question raised about his mental condition, and when he was sentenced to the penitentiary the Judge recommended he be given psychiatric care (RT 108). A document was marked Exhibit 4 and received in evidence, showing receipts by the witness Webster of about \$600 in the month of August, 1960 (RT 132). The witness Webster stated that he was a "fence"; he told this to Goldheimer; and that he received and sold stolen property (RT 136). Webster testified he had been to Mexico on another case with Agent Wilets (RT 141). The witness Webster testified that in connection with

the bank robberies which he had pled guilty to, he had obtained something in excess of \$10,000.00 (RT 160).

DONALD P. WILETS testified he was a Bureau of Narcotics Agent; that in June, 1960, on the 23rd, he was at the Pancake Restaurant and he saw Webster, Goldheimer and Mr. Walker. At about 10:00 p.m., these persons left the restaurant and entered a Volkswagen car (RT 162, 163); the agent testified that on July 13, 1960, he was at the Scandia Restaurant with Mr. Webster and the Defendant Goldheimer (RT 165); while at the restaurant he asked Goldheimer what his plans were for bringing back narcotics, and Goldheimer said he had a connection in Mexico and that the proposed plan to bring the marihuana back was to bring it from the vicinity of Guadalajara by truck up the coast to one of the ports, and there put the marihuana across the bay and then to the vicinity of Ensenada, where a boat would pick it up and bring it to the United States (RT 169-171). The Agent stated they talked about his financing Webster in the transaction, but this point was almost left in a nebulous stage; the thing he wanted was to have Goldheimer introduce Webster to a factory source for heroin (RT 172,173).

Agent Wilets said he stated to Goldheimer that he would like to see the marihuana at Ensenada and have two or three days with which to contact the buyers (RT 174, 175). The Agent stated that on July 14, 1960, he was at the Palms Bar with Webster and there saw Goldheimer and Walker; sometime after Walker and Goldheimer entered the bar, one of them suggested they leave; they walked outside the bar to a vehicle about 9:15 (RT 180); they went for a ride in the car, during which time he told Walker that he would finance Webster in the marihuana transaction in return for Webster getting him a direct factory connection for heroin (RT 181, 182). Walker said, "Are you going to front any money on this operation?" (RT 182). He told Walker that he would not put up any front money; he would not put up any money to go across the border. They returned in the car and Goldheimer and Walker left; Goldheimer said he could not go to Mexico then as he had some Court appearances (RT 182,183). Later he and Webster went to the CMA Airlines Office where he saw Webster fill out a tourist card for himself and one for the name "Irving Goldheimer." (RT 184, 185). On July 29th, he met Goldheimer with Webster at the Normandie Village Apartments and they went to the International Airport;

they bought a ticket; he saw Goldheimer check his suitcase (RT 185-187); he saw Goldheimer and Webster board Flight 911 (RT 187); between July 29th and August 4th, he had some conversations with Webster by telephone (RT 189); on August 4, 1960, he was at the airport and met Mexicana Airlines Flight and Webster and Goldheimer (RT 189,190); on the way in from the airport Goldheimer said he was unable to bring back any marijuana, that the money he had down there had been used; that it would be possible to get delivery at a later date (RT 193). Goldheimer was taken to the Normandie Village Apartments where he left the Agent and Webster; he stated that while they were coming in from the airport he had a recording device in the car and recorded their conversation between himself, Webster and Goldheimer (RT 196,197). He identified Government's Exhibit 1-B as a recording tape (RT 198). On August 10th, he met Walker and Goldheimer at the Pancake Restaurant; he had some discussion, nothing about narcotics (RT 199,200). The Agent stated to Goldheimer that he had about \$500 invested in this transaction and he was anxious to find out when Goldheimer could go to Guadalajara, Mexico; Goldheimer replied he was tied up for a while and could not go (RT 202); he

stated that at the conclusion of the conversation, he said to Goldheimer that he (the Agent) and Webster would go to Guadalajara about August 17th, where Webster would observe the heroin and he (Webster) and Wilson would make arrangements to accumulate marihuana, as much as they could get, and they would leave Guadalajara and come back to Los Angeles; he asked Goldheimer to leave Los Angeles as soon as he had made his Court appearances and come down and join him in Guadalajara (RT 204). Later the Agent said he said to Goldheimer, "Webster and I will go down on the 17th. He will come back for his Court appearance on the 21st or 22nd, * * * and you will come down and join me in Guadalajara, where we will finish getting the narcotics ready, and move them up to Ensenada where Walker will meet us with the boat. Is this agreeable to you?" Goldheimer said, "I guess it has to be." (RT 207) During these conversations, while they were riding in a car, he had a tape recorder in the car (RT 207,208). Exhibits 2-A, -B and -C were marked for identification. The witness identified Government's Exhibit 2-A, an envelope in which was contained a box containing Government's Exhibit 2-B, a tape recording (RT 209). On August 18th, he saw Webster, at which time Webster

bought a ticket on CMA to Guadalajara (RT 210); he saw Webster board the plane. Later, on September 5th, he saw Goldheimer at a restaurant on Sunset Boulevard (RT 210,211); he asked Goldheimer where Walker was and Goldheimer said he thought he was working on a boat making some repairs at a dock in Long Beach or San Pedro (RT 210-212); he next saw Goldheimer on Friday the 9th of September; he met him and Walker in Apartment 15 of the Normandie Village Apartments; he was accompanied by Agent Tingy, and he sent Tingy out to get a map; Tingy was employed by the Federal Bureau of Narcotics. He told Walker and Goldheimer that he had moved the narcotics up to Ensenada; that he had a map in the car which gave the location (RT 211, 212); Tingy returned with several other agents and they placed them under arrest (RT 213).

On cross examination, Agent Wilets stated that he would buy marihuana in return for introducing Webster as his agent into a factory connection for heroin; that he made this statement to Goldheimer; that he told Goldheimer that he had a substantial sum of money and that he had substantial financial backing; and he took a substantial sum of money out of his pocket and showed Goldheimer at the Scandia Restaurant (RT 236,

237), possibly \$2,000 or more (RT 237, 238). That before this meeting he had discussed with Webster having Webster go with Goldheimer to Mexico (RT 239); he had told Webster that he would defray all of Webster's expenses to Mexico (RT 239); that he first talked with Webster about Webster and Goldheimer driving an automobile to the interior of Mexico (RT 239, 240). He had discussed this matter with other agents and there were tentative plans to keep Webster and Goldheimer under observation on this trip (RT 240, 241). He stated that it was his opinion that if Webster and Goldheimer had crossed the border they then would have committed an overt act in support of conspiracy (RT 242, 243). That in his report to his superiors, Exhibit 5, he had made the statement, as follows: "On July 18, 1960, Goldheimer and the S.E. will be followed to the Mexican border, and their crossing will be observed. At this time a conspiracy will, in fact, exist." The S.E. was a designation by which he referred to Webster as a special employee (RT 243, 244).

Other Agents testified, including Leo Berman (RT 254) and Howard W. Chappell (RT 262). Chappell testified concerning his experiences in Mexico and meeting some persons there in connection with the sale

of narcotics. The defendant and appellant was not present at any of these meetings, nor were any discussions held with him by Agent Chappell concerning the same.

DEFENSE

EUGENE DUVALCOURT WALKER took the stand, denied any conspiracy between himself and Goldheimer concerning narcotics. He stated that upon one of their meetings, about June 23rd or 24th, Webster had asked him if narcotics could be brought from Mexico to the United States. He said that in view of his past experience with Customs Officers he thought it was feasible (RT 323, 324); he stated that Webster had told him that he had a man with a great deal of money who was looking for an investment; he thought the man had as much as \$30,000.00; he had money that he wanted to invest in a way that was not taxable (RT 324, 325).

IRVING GOLDHEIMER testified in his own behalf; he said he met Walker while he was in the City Jail at Long Beach; he was then 33 years of age. That he never discussed any plan or scheme to bring from Mexico to the United States narcotics while he was

in the jail (RT 363); he denied ever having told Webster while he was in jail that he had ever taken any marijuana from Mexico City to New York or any other place; that he had not brought narcotics into the United States. That he was released from jail in June, 1960. Some time after that Webster, who had asked him for his telephone number, called him (RT 362-365); Webster asked if he could meet him. That he had to go to court and so told Webster; when he arrived in court the next day Webster was sitting in the courtroom (RT 365). That he (Goldheimer) had borrowed a car from a friend and Webster asked him to drop him off some place, and while taking Webster, Webster said he had some stolen goods he was "looking to fence off or get rid of" (RT 366); he wanted to know if he (Goldheimer) knew anybody who could help him; he said he knew no such persons (RT 366). He had to go to court about three weeks later, and there he met Webster again; Webster was waiting for him in court (RT 366). Webster knew every time he had to go to court, apparently (RT 366). On this occasion Webster had no car and asked him to drop him off in San Pedro, which he did (RT 367). At one time while they were talking, Webster said he had a mink stole he would like to get rid of, and he

told him he knew no place where he could (RT 368). He said that some time later he met Webster at the Pancake Parade Restaurant; that prior to that time he and Webster had talked about Mexico; Webster spoke Spanish, and fluently; Webster said he had been there many times and they talked about Mexico; Webster told him he wanted to make some contacts in Mexico; he told Webster he knew some people there, but he did not know whether they had anything that he was looking for (RT 371). That the last time he met Webster was in Court, Webster had been waiting for him, and after his business was attended to, they went to the Coffee Shop in the Jergins Trust Building, and Webster then told him he was looking for narcotics, wanted to buy a lot of narcotics; he told Webster he knew nothing about buying a quantity of narcotics; he wasn't sure that he knew anybody that he was looking for (RT 372). The next time he met Webster, Webster told him he had a man with a lot of money and he wanted to know if he (Goldheimer) could make a trip with him and introduce him to some people in Mexico; he said he wanted to see if he could get an abundance of narcotics (RT 373). He said Webster asked him if he knew anyone there; he said he had no knowledge of narcotics, but he did know an American

who was living in Mexico, and Webster wanted him to introduce him to this man; Webster told him if he could get a large amount of narcotics there was money to be made and he (Webster) would take care of him; he said he had no money at the time, he had used up his money in paying for his lawyer. Webster told him he had a backer (RT 373, 374). Webster asked him to meet him at the Scandia, and he did, and there he met Agent Wilets; he had some drinks in the bar and then something to eat; during the course of their conversation, Wilets wanted to know if he could do anything for him; he said he didn't know whether he could or not; Wilets showed him \$2,000 and said he wanted to get a heavy amount of narcotics (RT 375); Wilets wanted him to go to Mexico and sort of set the situation up so he could get it; he told Wilets he was not too sure he could do it; Wilets told him he could put up \$10,000; he wanted Goldheimer and Webster to go down there and set up the situation for him; they were to attempt to arrange for the purchase of narcotics in Mexico (RT 376); Webster was to go to Mexico with him and they were to "pay the freight", pay all the expenses; that he (Goldheimer) had no money at the time and told Webster he had no money. Finally, after some meetings, he went to Mexico; Webster

got the tourists' cards and gave him one; he told Webster he had no money; Webster said if he scored big he would give him some money. He later met Webster and Wilets; Wilets drove them to the airport (RT 378); Webster came with Wilets and picked him up and they went to the airport; that he did not give Webster a hundred dollar bill, because he only had about \$50 on him; that he had told Webster he had no money, and that he (Webster) would have to pay for the tickets, and Webster did; that Webster knew this (RT 379). They went to Guadalajara; there they stayed at the Fenix Hotel, where Webster registered, and Webster paid the bills there; they stayed there about a week; the only thing he bought was a couple of meals and some cigarettes (RT 380). After arriving at Guadalajara, he made an effort to find Bryce Wilson, whom he had known for some time; he located him at Puerto Vallarta (RT 380-381); he had to fly over to Puerto Vallarta and Mr. Webster purchased the ticket for him. He found Wilson there; told him he had a friend who wanted to talk over business; he introduced Mr. Wilson to Webster, and Webster asked him if there was any possibility of obtaining heroin or marihuana; Wilson said he knew a few people, but wasn't sure, he would look

around and see what he could find out. Thereafter, they were in Guadalajara five or six days (RT 382, 383); after being in Guadalajara a day or so, Wilson took them to the penitentiary, where Wilson and Webster talked with some man in the jail; at that time he (Goldheimer) did not understand Spanish (RT 383, 384); when the discussions went on in the penitentiary, it was in Spanish and he did not understand it; they were at the penitentiary a couple of hours; they went back on another visiting day; he went there twice with Wilson and Webster; while they were in the penitentiary, some other man came into the cell and Wilson, Webster and the other man talked in Spanish; he saw no narcotics there; he did not understand what they were talking about (RT 384, 385); he did not smoke any marihuana while in the jail; while he and Webster were at Guadalajara he denied that he was to buy any narcotics, but merely to attempt to set it up for Wilets and Webster; he was not given any money to buy narcotics with (RT 387). After their trip to Mexico, he and Webster returned home, and Wilets met them at the airport; he did not know that Wilets was to meet them (RT 387). When Wilets met them at the airport, he drove Goldheimer home and Wilets and Webster sat in

the front seat of the car and he (Goldheimer) sat in the back seat. That Wilets wanted to know what the score was and how come they didn't come back with some narcotics; Wilets wanted to know if they had set it up for him and what was the delay; Wilets kept on questioning him and he asked Webster what they did down there; they said they went to jail and met this man, talked it over, but they needed more time to solicit and get the narcotics that he was looking for (RT 387, 388). Wilets didn't like the idea that he had to wait; Wilets was irritable, wanted to know what was really happening, how come they didn't set it up while they were down there. The witness stated that he had no intention of bringing back any narcotics for Wilets when he went there; he had no money with which to purchase narcotics; neither Wilets nor Webster had given him any money to purchase narcotics in Mexico (RT 388); Wilets wanted to know how they got into the jail, how they met these people, and how it was they could sit down in a cell and talk about narcotics. Wilets wouldn't believe that it was happening, that you could go to a jail and sit in these people's cell (RT 389). He had some discussion with Wilets and Webster about the method of transporting the narcotics from

Guadalajara to Los Angeles, into the United States (RT 389). They talked about bringing the narcotics back; they discussed the fact that it would be hard bringing them over the road, and Webster suggested they might use the boat "Pursuit"; he told Webster he had no jurisdiction over the boat; he knew nothing about that; one time he and Webster went down to look at the boat (RT 390). When he took Webster down to the boat, they looked it over, looked at some of the charts. He stated that he had been to sea; he was a merchant mariner by trade; prior to that he had been in the Army; he had known Walker about two years; he had no idea they could use the boat for a trip to Mexico; he had no control over it (RT 391). They talked about other boats, but not the "Pursuit"; he never had any discussion with Wilets about the possibility of bringing back narcotics by way of a truck, crossing the Gulf of California and coming up Baja California to Ensenada; that was Wilet's idea (RT 392). Wilets mentioned it was feasible enough if that could be done; he told Wilets he didn't know whether it could be done or not, he had never been there, he was not familiar with the roads in that country; he had never driven up Baja California to Ensenada; the only time he had ever been down there was

when he flew there (RT 392). After they returned, he saw Wilets again, and they discussed the subject of whether or not he, the witness, could go back to Mexico; Wilets said he wanted to go down and protect his money (RT 393). The witness stated he told Wilets he could not go, he had to go to Court; he told Wilets he could not go to Mexico (RT 394). That he had no intention of going back to Mexico (RT 394); he had no intention of having anything further to do with this transaction; he had no intention whatsoever of arranging for the purchase or sale of marihuana or narcotics when he went to Mexico with Mr. Webster (RT 394). That he didn't really know if the people could get that heavy amount of narcotics. That he had no money; Webster made the proposal, and Webster said he would pay all the bills. The witness was not working at the time, so he just went along (RT 394). That he would not have gone to Mexico at all except that Webster and Wilets asked him to; he had no intention of going there and breaking the law (RT 394). Before he talked with Wilets at the Scandia on the Sunset Strip, he did not know Nicolas Rodriquez Medina; he did not know a man by the name of Francisco Ochoa Mendez; he did not know the man described by Webster who came

to the penitentiary. He stated that between July 13, 1960, and continuing to August 30, 1960, he did not enter into any agreement or conspiracy, or have any understanding that he would receive, conceal, transport or facilitate the concealment and transportation of either heroin or marihuana; that he had no understanding with Wilson, Medina, Mendez, or anyone else (RT 395). That between the dates mentioned in the indictment, July 13, 1960, to August 30, 1960, he made no purchases, or made no effort to buy, sell, conceal or transport either marihuana or heroin, or any narcotics, and but for the discussions he had with Webster and Agent Wilets, he would not have gone to Mexico and attempted in any way to arrange for the sale or delivery of narcotics; but for their representations he would not have gone there (RT 395, 396).

STATUTES INVOLVED

Title 21 U.S.C., Sec. 174.

"Section 174. PENALTY; EVIDENCE.

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than \$20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the

defendant explains the possession to the satisfaction of the jury."

Title 21 U.S.C., Sec. 176(a).

"Section 176a. SMUGGLING OF MARIHUANA; PENALTIES; EVIDENCE; DEFINITION OF MARIHUANA.

Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than \$20,000.

Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury. ..."

SPECIFICATIONS OF ERROR

1. The Court erred in denying defendant and appellant's motions to grant a judgment of acquittal and in denying the motions for new trial. Entrapment was conclusively proven.

2. The defendant and appellant was denied a fair trial by reason of incidents occurring during the course of the trial, and particularly, the instruction of the trial court on the question of entrapment. The jury was improperly instructed as to entrapment.

3. As a matter of law, the guilt of the defendant was not established. The evidence was not sufficient, even if the evidence by all of the Government's witnesses is to be fully believed, as must be the situation here.

QUESTIONS PRESENTED FOR REVIEW

I

THE COURT ERRED IN DENYING DEFENDANT AND APPELLANT'S MOTIONS TO GRANT A JUDGMENT OF ACQUITTAL AND IN DENYING THE MOTIONS FOR NEW TRIAL. ENTRAPMENT WAS CONCLUSIVELY PROVEN.

II

THE DEFENDANT AND APPELLANT WAS DENIED A FAIR TRIAL BY REASON OF INCIDENTS OCCURRING DURING THE COURSE OF THE TRIAL, AND PARTICULARLY, THE INSTRUCTION OF THE TRIAL COURT ON THE QUESTION OF ENTRAPMENT. THE JURY WAS IMPROPERLY INSTRUCTED AS TO ENTRAPMENT.

III

AS A MATTER OF LAW, THE GUILT OF THE DEFENDANT WAS NOT ESTABLISHED. THE EVIDENCE WAS NOT SUFFICIENT, EVEN IF THE EVIDENCE BY ALL OF THE GOVERNMENT'S WITNESSES IS TO BE FULLY BELIEVED, AS MUST BE THE SITUATION HERE.

SUMMARY OF THE ARGUMENT

I

THE DEFENDANT AND APPELLANT GOLDHEIMER WAS ENTRAPPED INTO COMMITTING THE OFFENSES WITH WHICH HE HERE STANDS CHARGED AND CONVICTED.

II

THE COURT IN ITS COMMENT ON THE LAW OF ENTRAPMENT IN EFFECT EMASCULATED THE INSTRUCTIONS GIVEN TO THE JURY ON ENTRAPMENT.

III

THE COURT ERRED IN ADMITTING THE TESTIMONY OF HOWARD W. CHAPPELL CONCERNING HIS ACTIVITIES IN MEXICO. HE WAS NOT A CO-CONSPIRATOR, AND WHAT HE DID WAS AFTER THE CONSPIRACY HAD TERMINATED, IF IN TRUTH AND IN FACT THERE WAS A CONSPIRACY.

ARGUMENT

I

THE DEFENDANT AND APPELLANT GOLDHEIMER WAS ENTRAPPED INTO COMMITTING THE OFFENSES WITH WHICH HE HERE STANDS CHARGED AND CONVICTED.

We will not again repeat the testimony, for perhaps we have already been too verbose, but suffice it to say, summarized, the evidence is this:

That while Goldheimer was in the City Jail, he met the witness Webster, who had contacts with Deputy Sheriffs and a man who subsequently pled guilty to armed bank robbery, obtaining something in excess of \$10,000. This man had everything to gain by reason of his testimony. He spoke Spanish fluently; he had been under psychiatric treatment. While the Court stated to the jury that psychiatric treatment would no doubt benefit the man, it is for this Court to understand without question that he had been examined and prescribed for by a psychiatrist. The evidence plainly shows that Goldheimer met Webster in jail at Long Beach, where they talked about Mexico. Goldheimer had been to Mexico; he had a friend or two there. There

is no evidence that he had ever been engaged in the narcotic traffic in Mexico. The evidence established that Webster was a pretty smart fellow, as an examination of his testimony will show. Albeit he may be psychotic, but under all the circumstances only one fair deduction can be drawn, that is, that he was a smooth, articulate fellow, thoroughly conversant with Mexico and the Mexican language. It was he, after the release of Goldheimer from the City Jail in Long Beach, who looked up Goldheimer, and who first proposed to Goldheimer that he (Goldheimer) introduce him to someone in Mexico. Thereupon, Webster was introduced to Wilets, the Government Narcotic Agent, by a Deputy Sheriff with whom he had had contact in connection with his prior difficulties, and then the plans were laid. Wilets explained to Goldheimer that he had a large sum of money, and it was the Government Agent Wilets who advanced the funds to Webster to even buy the ticket to Guadalajara for Goldheimer. It was Webster who paid the expenses. The record shows that Webster had been given something over \$600, and then it was that Goldheimer, having nothing else to do, was induced by Webster and Wilets to go to Mexico. All in the world Goldheimer did was attempt to find a

friend; he didn't know whether the man could arrange for narcotics or not. His friend Wilson was then introduced to Webster and, after they had been in Mexico some days no definite arrangements, or any arrangements, were solidified for the purchase or delivery of any narcotics, either marihuana or heroin. Thereupon, Webster and Goldheimer returned to Los Angeles.

Notwithstanding the importunations of both Webster and the Government Agent Wilets, under whose specific direction he was working, Goldheimer never went to Mexico again; said he couldn't, and said he wouldn't have gone under any circumstances. He received no money, and there was no definite understanding. Being out of work, he merely took Webster to Mexico, or rather went with him, and took him to a friend. No arrangements for the delivery or sale of narcotics were ever consummated. Whatever he did insofar as he did it, he was honest, he was specific and frank with the Court, and the evidence shows that, as a matter of law, he was entrapped. We respectfully direct Your Honor's attention to the following legal discussion and authorities which we think are ample support for our position. The case

should be reversed.

1. Entrapment.

It is our contention that the law of entrapment is applicable in this case.

One of the latest expressions on the subject is Sherman v. United States, 78 Supreme Court Reporter No. 14, 819, at p. 820, where the court said:

"In Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413, this Court firmly recognizes the defense of entrapment in the federal courts. The intervening years have in no way detracted from the principles underlying that decision. The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. However, 'a different question is presented when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.'

(Emphasis supplied) 287 U.S. at p. 442, 53 S. Ct. at p. 212. Then stealth and strategy become as objectionable police methods as the coerced confession and the unlawful search. Congress should not have intended that its statutes were to be enforced by tempting innocent persons into violations.

"However, the facts that government agents 'merely afford opportunities or facilities for the commission of the offense does not' constitute entrapment. Entrapment occurs only when the criminal conduct was 'the product of the creative activity' of law-enforcement officials. See 287 U. S. at pp. 441, 451, 53 S. Ct. at 212, p. 216. To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal. The principles by which the courts are to make this determination were outlined in Sorrells. On the one hand, at trial the accused may examine the conduct of the government agent; and on the other hand, the accused will be subjected to an 'appropriate and searching inquiry into his own conduct and predisposition' as bearing on his claim of innocence. See 287 U. S. at p.

451, 53 S. Ct. at p. 216.

"We conclude from the evidence that entrapment was established as a matter of law. In so holding, we are not choosing between conflicting witnesses, nor judging credibility. Aside from recalling Kalchinian, who was the Government's witness, the defense called no witnesses. We reach our conclusion from the undisputed testimony of the prosecution's witnesses.

"It is patently clear that petitioner was induced by Kalchinian. The informer himself testified that, believing petitioner to be undergoing a cure for narcotics addiction, he nonetheless sought to persuade petitioner to obtain for him a source of narcotics. In Kalchinian's own words we are told of the accidental, yet recurring meetings, the ensuing conversations concerning mutual experiences in regard to narcotics addition, and then of Kalchinian's resort to sympathy. One request was not enough, for Kalchinian tells us that additional ones were necessary to overcome, first, petitioner's refusal, then his evasiveness, and then his hesitance in order to achieve capitulation. Kalchinian

not only procured a source of narcotics but apparently also induced petitioner to return to the habit. Finally, assured of a catch, Kalchinian informed the authorities so that they could close the net. The Government cannot disown Kalchinian and insist it is not responsible for his actions. Although he was not being paid, Kalchinian was an active government informer who had but recently been the instigator of at least two other prosecutions. Undoubtedly the impetus for such achievements was the fact that in 1951 Kalchinian was himself under criminal charges for illegally selling narcotics and had not yet been sentenced. It makes no difference that the sales for which petitioner was convicted occurred after a series of sales. They were not independent acts subsequent to the inducement but part of a course of conduct which was the product of the inducement. In his testimony the federal agent in charge of the case admitted that he never bothered to question Kalchinian about the way he had made contact with petitioner. The Government cannot make such use of an informer and then claim disassociation through ignorance.

"The Government sought to overcome the defense of entrapment by claiming that petitioner evinced a 'ready complaisance' to accede to Kalchinian's request. Aside from a record of past convictions, which we discuss in the following paragraphs, the Government's case is unsupported. There is no evidence that petitioner himself was in the trade. When his apartment was searched after arrest, no narcotics were found. There is no significant evidence that petitioner even made a profit on any sale to Kalchinian. The government's characterization of petitioner's hesitancy to Kalchinian's request as the natural wariness of the criminal cannot fill the evidentiary void. The Government's additional evidence in the second trial to show that petitioner was ready and willing to sell narcotics should the opportunity present itself was petitioner's record of two past narcotics convictions. In 1942 petitioner was convicted of illegally selling narcotics; in 1946 he was convicted of illegally possessing them. However, a nine-year-old sales conviction and a five-year-old possession conviction are insufficient to prove petitioner had

a readiness to sell narcotics at the time Kalchinian approached him, particularly when we must assume from the record that he was trying to overcome the narcotics habit at the time.

"The case at bar illustrates an evil the defense of entrapment is designed to overcome. The Government informer entices someone attempting to avoid narcotics not only into carrying out an illegal sale but also into returning to the habit of use. Selecting the proper time, the informer then tells the government agent. The set up is accepted by the agent without even a question as to the manner in which the informer encountered the seller. Thus the Government plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted (c.f. e.g., Lufty v. United States, 9 Cir., 198 F. 2d 760, 33 A.L.R. 2d 879; Wall v. United States, 5 Cir., 65 F. 2d 993; Butts v. United States, 8 Cir., 273 F. 35, 18 A.L.R. 143). Law enforcement does not require methods such as this. * * * *

"The judgment of the Court of Appeals is reversed, and the case is remanded to the District

Court with instructions to dismiss the incident.

"Reversed and remanded."

(Concurring Opinion of Mr. Justice Frankfurter):

"The courts refuse to convict an entrapped defendant, not because his conduct falls outside the prescription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the Government to bring about conviction cannot be countenanced. As Mr. Justice Holmes said in Olmstead v. United States, 277 U.S. 438, 470, 48 S.Ct. 564, 575, 72 L. Ed. 944 (dissenting) in another connection, 'It is desirable that criminals should be detected, and to that end that all available evidence should be used. It is also desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. * * * *for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part.'

"Insofar as they are used as instrumentalities in the administration of criminal justice, the federal courts have an obligation to set their

face against enforcement of the law by lawless means or means that violate rationally vindicated standards of justice, and to refuse to sustain such methods by effectuating them. They do this in the exercise of a recognized jurisdiction to formulate and apply 'proper standards for the enforcement of the federal criminal law in the federal courts', McNabb v. United States, 318 U. S. 332, 341, 63 S.Ct. 608, 613, 87 L. Ed. 819, an obligation that goes beyond the conviction of the particular defendant before the court. Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake." (Emphasis supplied.)

II

THE COURT IN ITS COMMENT ON THE LAW
OF ENTRAPMENT IN EFFECT EMASCULATED
THE INSTRUCTIONS GIVEN TO THE JURY
ON ENTRAPMENT.

We respectfully direct the Court's attention to the discussion by the Court on the subject of entrapment (RT 426-430):

"The defense of unlawful entrapment is offered by the defendants to each crime charged in the indictment.

"The law recognizes two kinds of entrapment: Unlawful entrapment and lawful entrapment. Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law enforcement officers to commit a crime, he is entitled to the defense of unlawful entrapment, because the law as a matter of policy forbids a conviction in such a case.

"On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that the government agent provides what appears to be a favorable

opportunity is no defense, but is a lawful entrapment. When, for example, the government has reasonable grounds for believing that a person is engaged in the illicit sale of narcotics, it is not unlawful entrapment for a government agent to pretend to be someone else and to offer, either directly or through an informer or other decoy, to purchase narcotics from such suspected person.

"If then the jury should find from the evidence that, before anything at all occurred respecting the alleged offenses involved in this case, the accused was ready and willing to commit crimes such as those charged in the indictment whenever opportunity was offered, and the government merely offered the opportunity, the accused is not entitled to the defense of unlawful entrapment.

"If, on the other hand, the jury should find that the accused had no previous intent or purpose to commit any offense of the character here charged, and did so only because he was induced or persuaded by some agent of the government, then the prosecution has seduced an innocent person, and the defense of unlawful entrapment is a good

defense, and the jury should acquit the accused.

"This question of lawful and unlawful entrapment is sometimes a little difficult to explain. The leading case on it came up during the prohibition era when some prohibition agents went to a man's home, and one of them said, 'Well, we are --' This is right after World War I when prohibition came in.

" 'We are old war buddies; used to be in the 30th Division together.' And this man, the defendant, was in the 30th Division, too. And they talked about old times. Then the government agent, who was claiming to be a business man somewhere, said something about could he get a quart of whiskey. And the defendant didn't respond to that. But they talked on, and finally the defendant went somewhere and produced, as I recall, a quart of whiskey. And the government agent paid him for it, and then arrested him for selling alcoholic beverages in violation of the law.

"The claim was made that this man was not a bootlegger, and there was no evidence that he was; and that he was doing this as a favor to an old war buddy of the 30th Division, as I recall. So

the Supreme Court said, 'Under those circumstances, where the man had no predisposition to bootleg whiskey and was enticed into it by government agent, that the defense of unlawful entrapment was available to the defendant.'

"We have entrapment in all kinds of cases. If you have had jury service, you probably have run across it in cases dealing with the theft of mail. Postal inspectors use it all the time. If they think a postal employee is stealing money from the mails, like March of Dimes, Community Chest, Red Cross, things like that, they get some envelopes and put some money in them and put them in the postal system. And that circulates around. And they watch this man through a peephole, sometimes with a telescope, and when one of those letters comes around to him, they watch him and if he takes that letter, they close in on him and make an arrest. Now, he's been entrapped.

"The clearest way I know how to put it, it's a difference of being entrapped into committing the crime, or entrapped into getting caught. If you are entrapped into getting caught, that is perfectly legal; because all police officers have

to do -- particularly in a case where there is stealth involved, and small objects involved. It's not much trouble to catch a man with an automobile, but it is quite a bit of trouble to catch him with a letter with some currency in it before he opens the letter and throws it away and puts the currency in his pocket. And it's the same way with narcotics.

"So, when you come right down to the distinction, you are passing upon what kind of a man is the defendant? Was he seduced? Was he an innocent person who had no disposition -- if it's narcotics, he had no disposition to engage in narcotics, but was enticed and persuaded, an innocent man; then, as the law says, he has been seduced. But if he has the previous disposition, if he is perfectly willing to sell and all he needs is a buyer, the fact that a government agent -- and they do it all the time, dress up like tramps, or something else, and they go into these places, as they say, to 'make buys'; and the fact that they pretend to be someone else and catch this man is no unlawful entrapment.

"I hope I have made it a little clearer for

you. But the best way I can think of it, in shorthand and very briefly put, is if the man is entrapped into committing a crime when he has no previous disposition to commit it -- I am not talking about a particular crime. But if a man is engaged in selling narcotics, the fact that he might not have made this particular sale if the government agent hadn't come along and pretended to be somebody he wasn't, that is no unlawful entrapment. But if he is not in that business, if he has no disposition to be in that business and he is enticed into it by a government agency, the policy applies -- it is unlawful entrapment.

"But if he is willing, if he has criminal notions, criminal intent, the fact that the government provides him the opportunity to commit the crime and thus entraps him into getting caught, is not an unlawful entrapment".

One must read the entire discussion to properly understand the unfortunate effect that such discussion would have upon the jury. The Court started out by giving a proper definition of entrapment, but then when it resorted to this explanation found on p. 428 of the

Transcript:

"The claim was made that this man was not a bootlegger, and there was no evidence that he was; and that he was doing this as a favor to an old war buddy of the 30th Division, as I recall. So the Supreme Court said, 'Under those circumstances, where this man had no predisposition to bootleg whiskey and was enticed into it by government agent, that the defense of unlawful entrapment was available to the defendant.'

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and make an arrest. Now he's been entrapped." a careful reading of this clearly indicates that the Court felt that here was a man with some predisposition to sell narcotics, when in truth and in fact there is nothing in this record from which such a deduction can be drawn.

III

THE COURT ERRED IN ADMITTING THE TESTIMONY OF HOWARD W. CHAPPELL CONCERNING HIS ACTIVITIES IN MEXICO. HE WAS NOT A CO-CONSPIRATOR, AND WHAT HE DID WAS AFTER THE CONSPIRACY HAD TERMINATED, IF IN TRUTH AND IN FACT THERE WAS A CONSPIRACY.

Howard W. Chappell was called by the Government and testified he was the agent in charge of the Los Angeles Office of the Bureau of Narcotics; that on August 19, 1960, he arrived in Guadalajara; he checked into a motel and looked for Webster. He was unable to find him. Later he found Webster.

The agent thereafter stated his activities with Webster and related some conversations with Bryce Wilson, and his conduct and contact with Webster, Wilson and other persons. All this evidence, which is to be found on pp. 262 to 283 of the Reporter's Transcript, Volume 2, relates contacts with persons in Mexico, discussions about narcotics, all in the absence of Goldheimer, who was actually in the United States at the time. Strenuous objection was made to all of this, as is shown by the record, (RT 262-270):

"Q Mr. Chappell, I direct your attention to August 19, 1960. Did you arrive in Guadalajara on that date?

A Yes, sir, I did.

Q At approximately what time did you arrive?

A Approximately 7:00 or 8:00 o'clock at night.

Q Were you met at the airport by anyone?

A No, sir, I was not.

Q What did you do following your arrival at the airport?

MR. PARSONS: To which I object as being incompetent, irrelevant and immaterial. In the light of the present testimony and in view of it, whatever Mr. Chappell did from this date on is incompetent, irrelevant and immaterial to any objective of the conspiracy, if in proof and in fact there was one.

THE COURT: What is the date?

MR. LONG: August 19th, your Honor.

THE COURT: Overruled.

THE WITNESS: I checked into a hotel. After I had checked into the hotel I made a check at a second hotel, the Virreinal, looking

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THE COURT: What is the date?

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THE WITNESS: I checked into a hotel. After I had checked into the hotel I made a check at a second hotel, the Virreinal, looking

for Special Employee Webster. I was unable to find him. I then returned to my own hotel, after leaving a message at Webster's hotel for him to contact me.

Q BY MR. LONG: Did Mr. Webster contact you?

A On August 21st --

MR. PARSONS: Your Honor, in the interest of brevity -- I know sometimes this isn't the best way to do it, but may we have a continuing and running objection to anything that occurred after this date by, or was done by Mr. Chappell, or any conversation --

THE COURT: After which date?

MR. PARSONS: August 19th, the date that he arrived in Guadalajara. It's our contention that what Mr. Chappell did then is incompetent, irrelevant and immaterial. The conspiracy, if in truth there was one, had been terminated at that time, in the light of the evidence as it now stands. And what he did is immaterial.

MR. LONG: Your Honor, the Government -- do you wish to hear the Government?

THE COURT: Isn't the evidence that the delivery was supposed to be made some time on

the 20th?

MR. PARSONS: I grant there was a delivery date, there was some discussion. I am reminded there was some discussion about that. But, regardless of that, Mr. Goldheimer had returned to Los Angeles by that time and had not returned to Mexico. And what Mr. Chappell did -- he is not a member of the conspiracy. What he did and said with various people is not binding upon Goldheimer. And I don't want to continually object.

THE COURT: No. You may have the objection. Of course, if he isn't a member of the conspiracy, anything he said or did --

MR. PARSONS: Even Webster is a feigned member of the conspiracy, not an actual --

THE COURT: -- anything he said or did would be certainly not binding upon any member of the conspiracy. I understand it's offered as corroborative of some earlier testimony.

MR. LONG: Your Honor, it's the Government's contention that the conspiracy continued until August 30th, at the time that the three co-conspirators who are not present, were arrested.

THE COURT: Very well. Proceed. It will be for the jury to decide, first, whether there was a conspiracy, and, secondly, who belonged to it, and, thirdly, how long it continued.

Proceed.

Q BY MR. LONG: Mr. Webster did meet you?

A Yes, sir, he did.

THE COURT: Certainly, after the conspiracy is over, why, what the former conspirators did cannot bind others who were formerly members of the conspiracy. Just like when a partnership is dissolved, the former partners can't bind each other any more.

Proceed.

Q BY MR. LONG: Did you have occasion to meet Mr. Bryce Wilson on August 21st?

A Yes, sir, I did.

Q By whom was he introduced?

A By Webster.

Q And where did you meet Mr. Wilson?

A In a little bar around the corner from my hotel just off main street in Guadalajara.

Q Did you have any conversation with Mr. Wilson at this time?

A Yes, sir, I did.

Q. Would you tell the court and the jury what Mr. Wilson said to you and what you said to Mr. Wilson on this occasion?

THE COURT: Was anyone else present?

THE WITNESS: Yes, sir.

Q BY MR. LONG: Who else was present?

A Mr. Webster, he was intermittently present. Let me clear that up. He was intermittently present. He made the introduction --if I may explain -- of Wilson to me, and then he proceeded to the bar to order a drink. And then he left the table on one or two occasions to get Mexican hors d'oeuvres that they were serving in the place. He was generally present during most of the conversation.

Q The conversation to which we will now refer is the conversation between you and Mr. Wilson?

A Yes, sir.

Q What did Mr. Wilson say to you and what did you say to him?

A We acknowledged the introductions. And I immediately asked him why the negotiations were delayed. I said, 'My people have been given to

believe by Goldheimer this transaction would be completed by the 21st. I have been in Guadalajara since the 19th, and this is the first that I have seen you.'

Bryce Wilson stated, 'Well, everything is all set.' He said, 'The weed is all set to go, but we can't get the heroin.'

I said, 'I am interested in heroin. And why can't we get it? It was my understanding everything would be set by tonight.' Which was the 21st.

He stated, 'The people got rid of the heroin, and we will have to wait about a week or so for them to convert some more.'

I then asked him whether we couldn't expedite it. I said, 'This is costing me money. I have been laying around here two days. I am anxious to get this over with.'

And he insisted the marijuana would be ready --

THE COURT: Who?

THE WITNESS: This is Wilson. He stated to me, 'The marijuana can be ready tomorrow, or at the latest in 48 hours.'

Q BY MR. LONG: Mr. Chappell, were you using an assumed name during the period of your stay in Guadalajara?

A Yes, sir, I was.

Q What was that name?

A Bill, William Heddeglin, H-e-d-d-e-g-i-n.

Q Were you representing yourself to be a certain type of individual, Mr. Chappell?

A Yes, sir. I told Wilson that I was there to protect the money and see that our interests had not dwindled, that we didn't get beaten for the money, or the money wasn't stolen.

Q During your conversation with Mr. Wilson on August 21st in the bar, was there any discussion about the delivery of the marijuana and the heroin, if and when the heroin becomes available?

A Yes. Wilson, after my first statement to him and after his answers to me, asked me where Goldheimer was at. I told him that Goldheimer had to be in trial on the following day, which was a Monday, that he couldn't come down; I was not sure whether he would come or not.

At that Wilson stated to me, 'Well, is

Walker going to have the boat at Ensenada?'

And I said, 'All arrangements are made. As soon as I have seen the stuff and I have possession of it, we will call Los Angeles and the boat will leave immediately for Ensenada.'

And I then said, 'We figure that the boat can make the trip from Los Angeles to Ensenada in the same period of time that we can make it from here to Ensenada.'

I then said to Wilson, 'I do not understand why you have arranged for this Mickey Mouse way of delivery.' And he asked me what I meant.

And I said, 'According to Goldheimer you want to cross the stuff over on to the Baja California coast and then go all the way up the coast to Ensenada.' I told him, I said, 'I have been over that road and I know that nothing less than a truck with four-wheel power can get over that road.'

And he said, 'Well, these are Hollywood people, and they have got to do the scene a certain way.'

And I said, 'Well, its ridiculous, because there is no need to go that way.'

And he said, 'They did not want to cross into the United States, and then come back into Ensenada.'

And I said, 'No need to do that. There is a new road, Highway No. 1, Mexican highway, new highway cuts over San Luis, and from San Luis into Mexicali, then go through Tecate, Tijuana, and into Ensenada without crossing over to the Baja California mainland.'

Q Did you discuss any alternate route with Mr. Wilson at that time?

A Well, he said that he didn't see why we wouldn't be better off taking the route I just suggested instead of going into Baja California."

There is a discussion between Chappell, Wilson and Medina about narcotics (RT pp. 274,275), all of which was highly prejudicial and could in no way involve Goldheimer. Our objection should have been sustained.

We have already contended that whatever Goldheimer did he was induced and entrapped into doing. We respectfully contend that the trial court, in admitting

the evidence of Chappell, which we have just referred to and which relates to the acts and declarations of alleged co-conspirators made out of the presence of the accused Goldheimer, was in error.

See People v. Busby, 40 Cal. App. 2d 193,
104 P. 2d 531;
People v. Kelly, 133 Cal. 1, 64 Pac. 1091.

Statements made by one defendant outside the presence of his co-defendant, and after consummation or frustration of the conspiracy, are hearsay.

People v. Gilliland, 39 Cal. App. 2d 250,
103 P. 2d 179;
People v. Doble, 203 Cal. 510, 265 Pac. 184;
People v. Singh, 1 Cal. App. 2d 729, 37 P.
2d 481.

Acts of Co-conspirators.

In order that an act of a co-defendant may be imputed to a defendant in a criminal action, the particular act must be shown to have been done in furtherance of the common object and design for which the defendants have combined.

People v. Werner, 16 Cal.App. 2d, 216, 105
P. 2d 927.

This was aggravated by the fact that Agent Chappell was attempting to lure these people into committing offenses, and it was Mr. Chappell who was making the statements and eliciting the conversations, all in the absence of Goldheimer, without his knowledge, consent or ratification.

This type of thing has been repeatedly condemned by the courts, and the use of the conspiracy statute to attempt to convict defendants, such as here, where there was no possibility of convicting of a substantive crime insofar as Goldheimer was concerned, has been condemned by the Supreme Court of the United States in no uncertain words.

See Krulewitch v. United States, 336 U.S. 440,
69 S. Ct. 716.

CONCLUSION

WHEREFORE, the defendant and appellant Irving Goldheimer respectfully prays that the judgment herein be reversed.

Respectfully submitted,

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TABLE OF EXHIBITS

(Rule 18(f))

<u>GOVERNMENT'S EXHIBITS:</u>	<u>FOR IDENTIFICATION</u>	<u>IN EVIDENCE</u>
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